CDPM
TL 3795-52

ASSEMBLEIA DA REPÚBLICA
PARLIAMENT OF PORTUGAL

INTER-PARLIAMENTARY CONFERENCE ON EAST TIMOR

LISBON, PORTUGAL 31 MAY - 2 JUNE 1995

EAST TIMOR IN THE CONTEXT OF THE PACIFIC REGION

The Hon Justice M D Kirby AC CMG *
Australia

A DEMOCRATIC PRIVILEGE

My legitimacy to speak to this conference, in the Parliament of the European country having the longest historical connection with my own, derives from four sources. First, I am a citizen of a free and democratic country, Australia. It is a nation with one of the longest uninterrupted constitutional traditions of self-government and freedom in the world. Its people are not obliged to conform to a governmental, still less a party, position. Its constitution guarantees free political expression.[1] This is a freedom which is vigorously asserted, as I am now doing. It is our democratic privilege

Secondly, I am a jurist. My daily work takes place in the independent courts of Australia. I am not a politician. I am answerable to no electorate and no lobby group. Only my conscience and my duty to the law govern me.

Thirdly, I am at present the Chairman of the Executive of the International Commission of Jurists (ICJ). This body, the oldest of the human rights organisations, is based in Geneva. It is dedicated to upholding human rights, the rule of law and the independence of the judiciary. The Commission has conducted missions to Indonesia.[2] Its Australian Section, of which I am President, has produced a report following a mission to East Timor.[3] The ICJ has been represented at the trials of Timorese accused in Indonesia. Its interests reflect those of other international bodies, including Amnesty International[4] which have shown the closest attention to what is happening in East Timor.

Fourthly, it has been my privilege to work in a number of activities of the United Nations and other international bodies concerned with international law. The views I express today are purely personal. But they derive from the experience of two decades of experience in various United Nations agencies and other bodies in the attempt to translate the aspirations of the *Charter* and the international law of human rights into action protective of the rights and dignity of ordinary people in every continent. At this stage of human history, it is the duty of lawyers to think creatively of the ways in which the new world order can be brought under the rule of international law - replacing force with law; oppression with human rights; poverty with development.

My international functions most relevant to this conference include my service in three Committees of Experts of UNESCO, one of which I had the privilege be chairman and in another, rapporteur. The work of these committees involved reflection upon the meaning of "self-determination" when used in international law and specifically upon the description of the characteristics of a "people". The purpose was to identify those who, by international law, are entitled to exercise the "peoples' right to self-determination". I shall return to that theme. But first, I must address the task assigned to me and say something on the question of East Timor in the context of the Pacific region.

EAST TIMOR AND THE PACIFIC

This is a topic that would perhaps be better addressed by a politician or by a representative of one of the many groups in Australia, New Zealand and other countries of Oceania who include refugees from, and support the cause of the people of, East Timor.

Any reflection on the geopolitics of Oceania will teach the great importance of Indonesia to the peace, stability and economic progress of the region. Not only is Indonesia one of the most populous states on earth. It is also one enjoying unprecedented economic growth. Its annual growth rate has been nearly 7% over the past twenty-five years. By 2020 it is expected that Indonesia will be the world's fifth largest economy. According to the World Bank, in the past twenty-five years the number of Indonesians living in poverty has fallen by 60% to just 13%. This figure will be further halved by the turn of the century. There have been major improvements in life expectancy, education, literacy and birth spacing.[5] These are mighty achievements. Indonesia is also Australia's closest neighbour. According to Prime Minister Keating in June 1994, no country is more important to Australia than Indonesia.[6] Other countries of the region, aspiring to the same economic lift-off, are aware of the remarkable achievements of Indonesia which promise benefits to all countries of the region. Viewed from the Pacific, the East Timor tragedy is seen through this perspective, which many hope contain the seeds of hope of future enlightenment.

Australia was one of the first countries to support the Indonesian demand for self-determination fifty years ago. In the Security Council, Australia objected to the "police action" as the Netherlands sought to reimpose colonial rule.[7] It secured the first cease fire resolution of the Security Council. But until recently there was not a great deal of popular interest in Indonesia within Australia. Generally, Indonesia was looked on with suspicion and some concern.

To the people of Timor, however, Australians owed a special debt of gratitude. During the Second World War they supported Australian soldiers in

their forward camps as they sought to stem the tide of the Japanese advance towards Australia. The fidelity of the *creados*, the Timorese youths who supported Australian troops is a legend of loyalty still often spoken of in Australia and still acknowledged by the Australian Government.[8]

There is no time to explore the events which led to the uprising in East Timor following the revolution in Portugal in 1974.[9] When Prime Minister Whitlam met President Suharto in April 1975 at Cairns he was given an assurance that Indonesia would not use force in East Timor. Prime Minister Whitlam stressed that there should be no departure from an internationally acceptable act of self-determination although he was of the view that the best result of such a plebiscite would be incorporation of East Timor into Indonesia. Yet the *Communiqué* of the meeting of the two leaders stressed that the Timorese people had the right to determine their own future.[10]

The matter which captured the attention of most Australians, following the Indonesian invasion of East Timor on 7 December 1975, was not the breach of this undertaking or the grave departure from international law. It was the death of five Australian television journalists, still unexplained and still a cause of concern to Australians.[11] At the time, Australia was distracted by the most acute constitutional crisis in its history following the dismissal of Mr Whitlam's government.

Indonesia claims that on 31 May 1976 the people of East Timor, through the duly elected members of a "Peoples' Representative Assembly", decided to become independent through integration with the Republic of Indonesia. It asserts that this integration was effected on 17 July 1976 whereby East Timor became the 27th Province of Indonesia.[12] However, neither the Australian Government nor the Australian people have ever accepted this assertion. The General Assembly of the United Nations in 1975 and the Security Council in 1976 deplored the Indonesian actions. Resolutions have ensued, although it has to be said that the number of supporters of the East Timorese cause in the United

Nations has steadily and consistently dropped in the past two decades.[13] In 1979 Australia recognised Indonesia's *de facto* sovereignty over East Timor. Recognition of *de jure* sovereignty followed in 1985 under the Hawke Government. Australia is one of about thirty countries which do so, many of which are in the Asia/Pacific region.[14] In December 1989, Australia signed the *Timor Gap Treaty* with Indonesia.[15] As recently as August 1994, Australia's highest court upheld the validity of the *Timor Gap Treaty* legislation.[16] The High Court of Australia determined that, even if the treaty were unlawful in international law, it could not be challenged successfully in an Australian court.

Australians have watched the foregoing developments, many of them with feelings of ambivalence encouraged by reports of serious unrest among the East Timorese people and excesses on the part of the Indonesian military in East Timor. The killings at Santa Cruz in November 1991, the subsequent trials and heavy sentences, the more recent outbreaks of violence in January 1995 at Baucau, Dili, and Liquica[17] have attracted much attention in the Australian Parliament, community and media. That attention is reinforced by the well-organised groups of East Timorese refugees who have made Australia their home. They number thousands. They have many supporters and sympathisers in the Australian community. The leaders of the Roman Catholic Church, including Cardinal Clancy in Sydney, have been highly critical of the Australian Government and its dealings with Indonesia over East Timor.[18] Both within and outside Parliament, the Australian Government has been under continuous pressure:

- To insist upon an improvement of the human rights and military situation in East Timor;
- To demand respect for the religious and cultural traditions of the East Timorese people;
- To terminate aid, particularly military aid, to Indonesia in the meantime; and

- (In some quarters) to "repeal the 1989 *Timor Gap Treaty*" as a step towards encouraging a process of self-determination for the people of East Timor.[19]

The concerns of many Australians on these issues are shared in New Zealand, and doubtless many other Pacific countries. A delegation of New Zealand Parliamentarians went to East Timor in October 1994. A great deal of interest was engendered in New Zealand by the murder, in the Dili massacre of 12 November 1991, of a New Zealander, Kamal Bamadhaj. His mother commenced proceedings in the United States against the military official alleged to have been responsible for the Dili operation. He was sent to the United States of America, seemingly as a rebuke - but recalled home once the legal proceedings were started.[20] This killing led to a severe cooling of relations between New Zealand and Indonesia. It encouraged greater public attention in New Zealand to the plight of the East Timorese people.

PERSPECTIVES FROM THE PACIFIC

It is not my purpose to review the issues which arose in the proceedings in the International Court of Justice between Portugal and Australia concerning East Timor. Within weeks it is expected that the Court's decision will be known on the preliminary points which have been argued. There are, of course, many Australians who support Portugal's action. They applaud the proceedings it has taken ostensibly to protect the interests of the people of East Timor who were formerly in Portugal's colonial charge and to whom Portugal in July and August 1974 promised the exercise of the right of self-determination, as yet unaccomplished.[21] There are Australians who feel that the repeated averments of their successive governments in favour of the right of the people of East Timor to self-determination contrasts sadly with the acceptance of *de jure* Indonesian sovereignty and the negotiation of a treaty, for Australia's economic advantage, based on that recognition.

On the other hand, there are, I feel bound to say, many Australians who regard Portugal's belated interest in its ex-colony as hypocritical, and amounting to grandstanding. They point to the material impoverishment of East Timor under Portuguese rule. They contrast the absence of humanitarian relief and development projects supported by Portugal since 1975 with that afforded by Australia and, for that matter, Indonesia.[22] They watch with cynicism the unfolding of the legal arguments in the International Court of Justice and contrast the tender concern expressed by Portugal for the people of East Timor with Portugal's agreement with Morocco to exploit the fishing resources of the Western Sahara which Australia has argued is directly analogous to the Timor Gap.[23] I imagine it is not much different in Portugal. Disillusionment with politicians when they embrace, apparently selflessly, high principles, is an apparently incurable condition of political democracies at the end of the 20th century.

I suspect that most Australians (perhaps like most Portuguese) are torn between, on the one hand, the recognition that an important principle of justice and of international law has been ignored and, on the other hand, a recognition of the practical realities and of the fact that the material condition of the great majority of the people of East Timor has been substantially improved (and promises to get better) under Indonesian rule.

There is good news coming out of Indonesia and East Timor which should be told. It includes the establishment of the Indonesian National Commission for Human Rights; the conduct of international workshops on human rights; the expressed interest of the President on the ratification of more international human rights treaties; the investigation by the Military Honour Council and the Human Rights Commission of the Dili Massacre of 1991 and the punishment of soldiers for proved misconduct where once they would have been protected by the military. Recently, there has been growing evidence of the independence of the judiciary in Indonesia.[24] In April 1993 there was a

downgrading of the military command structure in East Timor. A reduction to two battalions was promised by the end of 1995. The Indonesian roving ambassador on East Timor has met dissident groups in London.[25] The Indonesian Government, in July 1994, accepted the visit of the United Nations Special Rapporteur on Extra-Judicial Summary and Arbitrary Executions. His visit followed that of the United Nations Secretary-General's Special Envoy on East Timor (Mr Amos Wako) in April 1993.[26]

The international community has continued to keep East Timor, like Tibet and other places where people have been denied self-determination, in the forefront of political and public consciousness. Resolutions of the European Parliament, of the United States Congress and repeated actions of the international media and of the Roman Catholic Church have combined to apply pressure to the Indonesian military authorities and government. Whether they like it or not, they know that they are under the international spotlight in East Timor. The spotlight will not go away.[27] The attempt to prevent news coverage of East Timor itself becomes news. The official justification of the Australian Government's friendly relations with Indonesia has included the assertion that close contact is the only effective way by which expressions of concern, including about East Timor, are likely to have an impact on the thinking of the Indonesian Government and its officials.[28]

Yet the repeated reports of acts of violence in East Timor indicate that the abiding problem of denying a people their right to self-determination remains. The Australian Government, doubtless like many other governments, has made repeated representations urging the grant of more autonomy to the people of East Timor within Indonesia. It has urged the reduction of the military presence to levels typically found elsewhere within Indonesia.[29] It has directed development assistance towards improving the material condition in the province. It has repeatedly urged Indonesia to recognise the needs for cultural sensitivity, including to the religious differences of East Timor from other parts of

Indonesia.[30] But lately a growing sense of discouragement has entered the statements on East Timor made by the Australian Foreign Minister, Senator Gareth Evans. Whereas East Timor was once described by Indonesia's Foreign Minister as a "pebble in the shoe" of Indonesia, Senator Evans has lately suggested that it is "a rock in the path"[31] of progress towards good relations and an obstacle to civil peace within Indonesia. The Australian Minister has frankly acknowledged that he is not sure of the impact of Australia's representations beyond the Indonesian Foreign Minister.[32] The "dynamic, multi-layered" approach to representations[33] does not seem to have had much practical effect. As recently as 17 May 1995, the Minister acknowledged:

> *"The truth of the matter is that there is no progress towards the kind of reconciliation strategy that we would all like to see. There is an active debate going on, but that needs to be translated into action."*[34]

The Minister described the Indonesian presence in East Timor as "oppressive". He was reported as admitting that international pressure had failed to improve the lot of the local people.

It is against this background that Australians watch with concern the reports of suggested Australian arms sales to Indonesia, Indonesian military participation in training and anti-terrorist exercises in Australia and growing Indonesian army participation in Australian military colleges.[35] Whilst in normal circumstances, these links would be welcomed in the case of a friendly neighbour, where that neighbour is reportedly oppressing people of a different history and culture to whom it has persistently denied the right of self-determination, it is natural that a free people in a neighbouring country will respond with deep anxiety.

THE RIGHT TO SELF-DETERMINATION

The UNESCO work on the right to self-determination was a courageous project. Most organs of the United Nations will not touch this issue for fear of alienating the member states which stand resolute and virtually unanimous against any suggestion that the peoples' right to self-determination might threaten their sovereign control and the integrity of their territory.

The first article of the United Nations *Charter*, written fifty years ago this year, establishes the new organisation on the foundation of:

> *"Friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."*[36]

The common first articles of the *International Covenants* declare:

> *"All people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".*[37]

The International Court has given its blessing to the self-determination of peoples as a legal right, both in its opinion on Namibia[38] and its later opinion on West Sahara.[39]

Yet international law and politics have always been ambivalent about this idea. When the people of Biafra claimed it, they were denied it.[40] Only when the severance of East Pakistan was an accomplished fact did the people of Bangladesh win recognition by the international community of the achievement of their right, by revolution and bloodshed. Nor has there been consistency in the application of the principle to ex-colonial peoples. The people of Hong Kong have been traded between two great powers without a proper act of self-determination by them. The people of East Timor have not exercised their right.

Even amongst the thirty states which recognise Indonesia's sovereignty, few, if any, pretend that it rests upon the freely exercised will of the people of East Timor.

There are, of course, critics of the demand to give the claim to self-determination a wide ambit. Self-determination can have an emancipatory role. But it can also manifest a potentially destructive impact.[41] Yugoslavia, Rwanda, Chechnya and many other places illustrate this fact. Self-determination must find its place in international law amongst the competing objectives of that law - including the assurance of international peace and security, respect for states and their unique position in international law and furtherance of the great objective of development which will rescue states and people from poverty, disease and economic colonialism.

Within the UNESCO committees, there was unanimity about the features of a "people" for the purposes of the peoples right in international law to self-determination. Four features were described:

1. That the "people" concerned had common elements of history, tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection and common economic life;
2. That they were sufficiently numerous to be a "people" for the purposes of international law;
3. That they had institutions which gave expression to their commonalities as a "people"; and
4. That they exhibited the will to be, and to be seen to be, a "people", entitled to exercise the self-determination right.

There can be no doubt that, at least in 1974 and 1975, the people of East Timor had these characteristics. From such independent reports as are available, it would appear that they maintain those characteristics. But this cannot be

known with assurance, in the absence of a plebiscite or other free and fair exercise of the right to self-determination that would be accorded international recognition. True, there is some evidence that the enormous material investments which Indonesia has poured into East Timor have attracted some of its people to the cause of Indonesian integration. The evidence for this includes the report of a huge demonstration outside the Governor's Palace (said to have been 15 to 20,000 people) on 26 November 1994 in support of Indonesia. However, the lesson of this century is that such pro-government demonstrations can readily be mounted. We still have vividly in our minds the images of the demonstration in support of Romania's Ceausescu which suddenly turned into the instrument of his removal and death.

Both by the general criteria and by their long status as a colonised people, the people of East Timor enjoy the right to self-determination in international law. The Secretary-General of the United Nations, through his Special Representative, Mr F Vendrell, continues to offer the good offices of the United Nations to resolve the differences between Indonesia, and Portugal over East Timor. The Australian government welcomes these initiatives. But the Australian people are doubtful that much will change. It would have been different if East Timor had not been integrated. But that fateful step having occurred, it becomes difficult for East Timor to depart without enlivening the separatist movements in Acheh, Bali, the Moluccas, West Irian and elsewhere. Indonesia and its neighbours know that. The last thing they want is regional repetition of Yugoslavia or Rwanda.

FREEDOM: A MATTER OF THE SPIRIT

In the end, this conflict will not be resolved in the conference halls or courtrooms of the United Nations. Still less will it be resolved in the Parliaments of Australia, Portugal or Indonesia. The resolution, ultimately, will be found in the hearts of the people of East Timor. Indonesia will continue the attempt to

persuade allegiance by offering those people a share in the undoubted progress which Indonesia is making, economically and socially. That progress will itself promise, in due course, a more enlightened recognition of the truth that you cannot subjugate and dominate forever a people who wish to be separate and different.

Far away in East Timor are the people who know the answer to the riddle which we are examining. The answer belongs to them. It does not belong to states or countries or to history, geography or economics. Those who are pessimistic should remember the enormous progress in freedom that we have seen in the past decade. In due course freedom will also come to East Timor. It may be freedom, freely chosen, within Indonesia. It may be the freedom of independence. International law promises that that freedom belongs to the people of East Timor. No one else has the right to take it away or to deny it. Ultimately, that freedom will prevail.

FOOTNOTES

* Chairman of the Executive Committee of the International Commission of Jurists. President of the Court of Appeal, Supreme Court of New South Wales, Australia. Chairman and Rapporteur of the UNESCO Expert Group on the Peoples' Right to Self-Determination.

1. *Australian Capital Television Pty Limited v The Commonwealth of Australia* (1992) 177 *Cth Law Reps* 106 (High Court of Australia).

2. International Commission of Jurists, *Indonesia and the Rule of Law*, Geneva, 1990.

3. Australian Section of the International Commission of Jurists, *Timor Tragedy - Incident at Santa Cruz: 12 November 1991*, Sydney, July 1992.

4. Amnesty International has made numerous reports on Indonesia. See eg Amnesty International, *Indonesia*, 28 July 1993, London.

5. G J Evans, "Australia and Indonesia - Neighbours for Half a Century", Address to Australian Institute of International Affairs, National Conference on Indonesia, Canberra, 25 November 1994, 2.

6. *Ibid*, 1.

7. *Id*, 3.

8. M Turner, *Telling: East Timor Personal Testimonies 1942-1992*, 1993. See also Australia, Department of Foreign Affairs and Trade, "Australian Government Policy on East Timor", 5.

9. International Court of Justice, Application by Portugal, *Portugal v Australia - East Timor*, 22 February 1991, 2.

10. A Renouf, *A Frightened Country*, 445 cited M Tate, Australia, Second Statement to the International Court of Justice, 6 February 1994, 2.

11. Australia, Departmental Statement, above n 8, 4.

12. Statement by Ambassador Marpaung (Indonesia) in Record of the 1089th Meeting, Special Committee on the Situation with Regard to Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples, UN General Assembly, Doc A/AC.109/PV.1089, 4 August 1977, 16, reproduced in International Court of Justice, Memorial Submitted by the Government of the Republic of Portugal, East Timor (*Portugal v Australia*), Vol III, annex II.39 ff, 18 November 1991.

13. Recorded in the Australian Memorial, *Ibid.*

14. Evans, above n 5, 7.

15. Australian Government, above n 8, 5.

16. *Horta v The Commonwealth of Australia* (1994) 16 *Aust Law Journal Reports* 620 (HC).

17. Australia, Department of Foreign Affairs and Trade, "East Timor - Recent Issues", 1.

18. Transcript of interview with Senator G J Evans, Parliament House, Canberra, Australia, 19 July 1994, 1.

19. The question by Senator V Bourne, in *Commonwealth Parliamentary Debates*, (The Senate), 7 February 1995, 572. See also K Suter, "Timor Gap Treaty - The Continuing Controversy" in *Marine Policy*, July 1993, 294.

For other Australian literature see J Dunne, *Timor: A People Betrayed*, Jacaranda, Brisbane, 1993; J Jolliffe, *East Timor: Nationalism and Colonialism*, Queensland Uni Press, Brisbane, 1978: J Taylor, *Indonesia's Forgotten War: Hidden History of East Timor*, Zed, London, 1991. See also Australian Parliament, Senate Standing Committee on Foreign Affairs and Defence, *The Human Rights and Conditions of People of East Timor*, AGPS, Canberra, 1983.

20. R S Clark, "Public International Law and Private Enterprise: Damages for a Killing in East Timor", unpublished paper of the Professor Law, Rutgers University School of Law, 1995.

21. The recognition of that right was made by Constitutional Law of Portugal 7/74 of 27 July 1974. This was followed by a memorandum of 3 August 1974 addressed by the Government of Portugal to the Secretary-General of the United Nations. See *Portuguese Memorial*, above n 9, 2.

22. Tate, above n 10, 7.

23. During argument in the International Court of Justice, there was a dispute concerning the significance of Portugal's agreement which Australia sought to introduce into evidence as new information which had come to light since the close of pleading. The purpose was to suggest double standards on the part of Portugal.

24. Australian Government, "East Timor and Human Rights - General Government Response", 10 May 1995, 1. As to the recent decision, see P Walters, - "Indonesia's Judiciary Offer Hope of Fairness", *Weekend Australian*, 6-7 May 1995, 14. On 4 May 1995 the Supreme Court overturned the conviction of seven people convicted in 1994 for their alleged involvement in the murder of a labour activist. See also the release on 20 May 1995 of Muchtar Pakpahan, an independent trade unionist.

25. Australian Government Policy, above n 8, 2.

26. *Ibid*, 1.

27. Interview of Senator G J Evans, Foreign Minister, on "Sunday Programme", 20 July 1994, tspt 7.

28. Interview with Senator Evans, above n 18, 5.

29. Australian Government, above n 8, 1.

30. *Ibid*, 3.

31. Transcript of a press conference given by Senator G J Evans, Australian Foreign Minister, to Australian journalists in Jakarta, Indonesia, 21 February 1995, 1.

32. G J Evans, Address, above n 5, 6.

33. *Ibid*, 4.

34. Quoted G Boreham, "Indons 'Oppressive': Evans", *The Age*, Melbourne, 17 May 1995, 1.

35. D Jenkins, "Australia Takes Lead Training Indon Army", *Sydney Morning Herald*, 18 May 1995, 4.

36. United Nations *Charter*, Article 1.

37. *International Covenant on Civil and Political Rights*, Article 1.

38. International Court of Justice *Reports*, 1971, 16, 31.

39. International Court of Justice *Reports*, 1975, 12, 31ff.

40. See eg H Hannum, "Rethinking Self-Determination", 34 *Virginia J Int Law* 1, (1993), 5; C Tomuschat, "Self-Determination in a Post-Colonial World", in C Tomuschat (ed), *Modern Law of Self-Determination*, 1993, Clewer, 1; M Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice", (1994) 43 *ICLQ* 241, 245; R S White, "Self-Determination: Time for a Reassessment?" (1981) 28 *Netherlands Int L Rev* 147; M D Kirby, "Peoples Rights and Self-Determination" in A E S Tay (ed) *Rights, Human Rights and the Rights of Peoples*, (1993) 18 *Bulletin Aust Soc L Philos*, #61, 25 at 27.

41. R Falk, "The Content of Self-Determination", in R McCorquodale and N Orosz, (eds) *Tibet: The Position in International Law*, 1994, Serindia, London, 81.